**Editor's note: 98 I.D. 70; Appealed -- Civ.No. 91-592 (W.D. Penn. April 8, 1991), aff'd, (June 11, 1992) aff'd, No. 92-3366 (3rd Cir. Feb. 2, 1993)**

GATEWAY COAL CO.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

JUNE S. STOUT, INTERVENOR

IBLA 89-158 Decided March 6, 1991

Appeal from a decision of Administrative Law Judge Joseph E. McGuire denying application for review of Notice of Violation No. 82-1-31-9 (CH 2-50-R).

Reversed in part, affirmed in part.

1. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Occupied dwelling." The definition of "occupied dwelling" set forth at 30 CFR 761.5 does not require that the dwelling be used solely for human habitation. So long as the "building is currently being used on a regular or temporary basis for human habitation," the structure falls within the scope of the regulatory definition. A building is properly determined to be

an "occupied dwelling" notwithstanding the fact that

an occupant also operates a full-time antique business in the building.

2. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally--Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally

The effects flowing from issuance of a permanent program permit operate prospectively from the date the permit is secured or issued and do not operate to
deny OSM the authority to enforce a notice of violation issued during the interim program for a violation arising during the interim program.

3. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act
of 1977: Permits: Generally--Surface Mining Control
and Reclamation Act of 1977: Prohibition of Mining Operations: Generally

An applicant seeking to take advantage of the valid existing rights exception to the application of 30 U.S.C. § 1272(e)(4) and (5) (1988), bears the
burden of proving the existence of the rights giving rise to such entitlement.

4. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operation." Notwithstanding a State regulatory authority's determination that a portal building and adjacent parking lot did not fall within the State definition of a surface coal mining operation, the building and parking lot will be considered a surface coal mining operation subject to

the prohibitions in sec. 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e) (1988), when the evidence establishes that these surface facilities exist to support and are "incident to" underground mining.

5. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface

Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

Under sec. 522(e)(4) and (e)(5) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e)(4) and (e)(5) (1988), no surface impacts incident to underground mining may be created within 100 feet of a road and 300 feet of an occupied dwelling unless the mine operator had a valid existing right on Aug. 3, 1977. To have valid existing rights on Aug. 3, 1977, under the regulatory scheme currently applicable to adjudications arising under the interim program, the operator conducting underground mining must have held property rights which were created by a legally binding document authorizing the operator to create those surface impacts incident to an underground mining operation being contemplated, and must have made a good faith effort to obtain all permits required to conduct such operations prior to Aug. 3, 1977, or show that the coal is both needed for and adjacent to an ongoing surface coal mining operation.

6. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

When approval of an erosion and sedimentation control plan was the only "permit" a coal company was required to obtain before creating the surface impacts located within the 100- and 300-foot buffer zones, and it is shown that application was made prior to Aug. 3, 1977, and the plan was approved on Aug. 12, 1977, a good faith effort to obtain all permits

required to conduct surface impacts incident to mining within the 100- and 300-foot buffer zones has been demonstrated for purposes of establishing valid existing rights on Aug. 3, 1977.

7. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

A coal mine operator failed to show that a valid existing right to create surface impacts on the lands in question existed on Aug. 3, 1977. The right to

mine coal had been severed from the surface right prior to Aug. 3, 1977, and the operator failed to demonstrate that: (1) a merger of title prior to that date;

(2) all of the coal to be mined in conjunction with the surface impacts was within the lands held by the grantor at the time of severance; (3) the conveyance document at the time of severance included the right to create the surface impacts for the purpose of extracting coal from lands other than that conveyed by the grantor; (4) the existence of a lease or other express agreement granting such right; or (5) the existence of any other contractual relationship between the coal owner and the surface owner binding the surface owner to dedicate the land to the coal mining operation.

8. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

A disparity in the consideration term of a surface lease executed after Aug. 3, 1977, and a letter preceding Aug. 3, 1977, precluded a finding under Pennsylvania law that a legally enforceable lease was in existence on Aug. 3, 1977, affording the valid existing rights claimant the right to create the surface impacts within the 100- and 300-foot buffer zones.

APPEARANCES: Henry Ingram, Esq., and Thomas C. Reed, Esq., Pittsburgh, Pennsylvania, for Gateway Coal Company; Joseph M. Wymard, Esq., and Robert J. Fall, Esq., Pittsburgh, Pennsylvania, for Intervenor, June S. Stout; Wayne A. Babcock, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

IBLA 89-158

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Gateway Coal Company (Gateway or appellant) appeals from a November 25, 1988, decision of Administrative Law Judge Joseph E. McGuire

118 IBLA 132

(Judge) denying Gateway's application for review of Notice of Violation (NOV) No. 82-1-31-9.

Factual Background

Between 1924 and 1962 Hillman Coal and Coke Company (Hillman), owned and operated the Gateway Mine, then known as the Edwards Mine (Transcript of Proceedings (Tr.), Volume 2, pages 227-28). 1/ The Gateway Mine is an underground mine, producing bituminous coal from the Pittsburgh seam in Greene County, Pennsylvania (Gateway Statement of Reasons (Gateway SOR) at 7).

Hillman discontinued operations in 1962 and leased the mine to Gateway (Decision at 2), a partnership between Jones & Laughlin Steel Corporation (J&L) (75% owner) and Wheeling Pittsburgh Steel Company (Wheeling) (25% owner) (Tr. 3 at 7), with J&L acting as the managing partner. This partnership operated the mine until 1980, when J&L withdrew, and Diamond Gateway Coal Company (Diamond) became Wheeling's partner. Id. Diamond assumed the role of managing partner (Tr. 3 at 8).

Under the March 1, 1962, lease between Hillman and Gateway (Tr. 2 at 228; Gateway Exh. A-19), Gateway was granted the right to mine coal beneath various tracts identified in Schedule "A" of the lease, including a "portion of [the] Thomas Ross Heirs Tract No.2 -- 12.2819 Acres" (Thomas Ross tract)

1/ Volume 1 of the transcript covers the Apr. 29, 1985 proceedings;
Volume 2 covers proceedings on Apr. 30, 1985, and Volume 3 covers proceedings on May 1, 1985.

(Tr. 2 at 229-30; Exh. A-19), which includes the coal underlying the Ruff Creek Portal site (Tr. 2 at 230).

The granting clause of the 1962 lease (§ 1.01) provides:

> Hillman, in consideration of the covenants and agreements hereinafter contained to be kept and performed by Gateway, has leased, let and demised, and by these presents does lease, let and demise to Gateway, for the term hereinafter defined, Eighty-six (86%) percent of the presently remaining unmined and recoverable coal of the Nine-Foot, Pittsburgh or River Seam or Vein, and the mining rights, other rights, privileges and restrictions connected therewith, located within and underlying the coal tracts and portions of coal tracts situate in Jefferson, Morgan, Franklin and Washington Townships, Greene County, Pennsylvania, described in Schedule "A" attached hereto
>
> and made a part hereof.

The description of the Thomas Ross tract, found in Schedule A, contains the following language:

> ALL of said coal underlying the easterly portion of the Thomas Ross Heirs Tract No. 2, situate in Washington Township, Greene County, Pennsylvania, having an original area of 219.9807 acres, of which area approximately 12.2819 acres is hereby leased, described as Tract XIX in the Jennings-Emerald Land Deed.
>
> TOGETHER with the right to mine and remove all of said coal, without being required to provide or leave support for the overlying strata or surface, and without being liable for any injury to the same or to anything therein or thereon by reason thereof, or by the manufacture of this or other coal into coke; and with all reasonable privileges for ventilating, pumping and draining the mines, and the right to keep and maintain roads and ways in and through said mines forever for the transportation of said coal, and of coal, minerals and other things to and from other lands.

The Pittsburgh seam coal is mined and transported to the surface by underground conveyor belts. According to Gateway's witness, the use of

this mining method makes it necessary to have "all the main entries and the sub mains [constructed] on straight lines that intersected at ninety degrees" (Tr. 2 at 237). Given the coal depth, ventilation shafts must be sunk at 2-mile intervals. Id. 2/ Every second ventilation facility site is equipped to move men and equipment (Tr. 3 at 31-32). With this general mine layout, Hillman and Gateway were able to predict the future location of the Ruff Creek facility shafts and portal site, with a margin of error of 1,000 feet, as early as 1962 (Tr. 2 at 247). The Ruff Creek portal, the fourth ventilation facility developed in the Gateway Mine under the Gateway mining plan, was also designed and built to move men and equipment (Tr. 3 at 31).

Owing to the projected need for portal and shaft sites, and in expectation of Gateway's exercise of an option lease to mine an additional 5,300 acres within 10 years of the date of the 1962 lease agreement (Tr. 2 at 251-52; Exh. A-20), Hillman purchased the surface of the 71-acre Ruff Creek portal site in 1964. The specific purpose for acquiring this surface tract, known as the Smadbeck tract (Tr. 2 at 252), was to meet Gateway's ventilation needs (Exh. A-20; Tr. 2 at 247, 249).

After purchasing the Smadbeck tract, Hillman received several third- party offers to purchase or lease the site, but Hillman refused to do so to ensure that this surface tract would be available for Gateway's use as a

2/ Gateway's witness testified that this distance was the economic limit for moving air through a coal mine (Tr. 2 at 238).

shaft site (Tr. 2 at 255-57; Exh. A-23). On February 14, 1975, Hillman sent written confirmation of an earlier oral understanding that the Smadbeck tract was being held for shaft and portal facilities (Tr. 2 at 261-62; Exh. A-25) and offered to lease the tract to Gateway for a term of 20 years at a rental of $12,000 per year, payable in monthly installments. On June 23, 1977, Gateway responded to Hillman that it desired to acquire or lease the site for use as a portal and supporting facilities for 25 years or more (Exh. A-31; Tr. 2 at 262-63). On July 15, 1977, Hillman responded stating that it would lease the Smadbeck tract as a site for a portal and supporting facilities for $1,500 monthly rental for so long as Gateway's needs dictated, but was not interested in having property sublet (Tr. 2 at 263-65; Exh. A-32).

A formal lease agreement was executed by Hillman and Gateway on November 15, 1977, providing for a monthly rental of $1,250 per month, and restricting the subleasing to "any company into which Lessee, or any successor, may be merged" (Exh. A-34 at 5). Since 1964 Gateway has been given access to the Smadbeck tract to drill test holes (Tr. 2 at 305 and Tr. 3 at 87), and was allowed to do the site evaluation, mapping, and inspection necessary to apply for and obtain approval of an erosion and sedimentation plan for the tract (application filed June 16, 1977). An onsite inspection relative to approval of that plan took place on May 11, 1979 (Exh. A-45). Final placement of the portal and related support facilities was determined after consulting hydrologists and geologists, and analyzing test holes bored between February 1976 and May 1977 (Tr. 3 at 71-75).

The Ruff Creek facility consists of air intake and exhaust shafts (Tr. 3 at 10-11; Exh. A-1), with large fans at the exhaust or return shaft (Tr. 3 at 11, 31, 40). The intake shaft at Ruff Creek also serves as a mine entrance with hoisting facilities (Tr. 3 at 10, 30). A portal building located adjacent to the intake shaft contains locker and shower facilities for the miners, a waiting room, Gateway management offices, and a first aid station (Tr. 3 at 29; Exhs. A-1, A-8 through 12). The surface facilities also include a parking lot for miners, a chain link fence, an electrical transformer, two water treatment plants, and a sedimentation pond (Tr. 3 at 9, 11; Exh. A-1).

A home owned by June S. Stout (Stout) is situated directly across State Route 221 from Gateway's portal facility. Stout purchased her home in December 1966 and has occupied it since April 1967 (Tr. 2 at 193). The house occupied by Stout is a 150-year-old Georgian-styled home, which has been restored and registered in the Pennsylvania Historic Registry (Tr. 2 at 204). It is furnished with antiques which she offers for sale to the public in her full-time antique business (Tr. 2 at 197-98).

The Gateway surface facilities, or impacts, lying within the 100- and 300-foot buffer zones for Stout's home (which will be discussed in detail later in this opinion) include most of the portal building (Tr. 1 at 18, 24; Exh. A-2 through A-14), a painted chain link fence (Tr. 1 at 33) and part of the blacktopped parking lot, and electrical facilities (Tr. 2 at 23-24; Tr. 3 at 9). All other Ruff Creek surface facilities (impacts) lie outside the buffer zone.

Procedural History

On April 2, 1982, the Office of Surface Mining Reclamation and Enforcement (OSM) issued NOV No. 82-1-31-9 to Gateway (Tr. 2 at 160) after an investigation made pursuant to a citizen complaint filed by Stout (Exh. R-3). The NOV cited Gateway for two violations of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1201 (1988). The first citation was for disturbing areas within 300 feet of an occupied dwelling in order to facilitate mining, in violation of section 522(e)(5) of SMCRA (30 U.S.C. § 1272(e)(5) (1988)) (Exh. R-2). The second was for disturbing areas within 100 feet of a public road in order to facilitate mining activities, in violation of section 522(e)(4) of SMCRA (30 U.S.C. § 1272(e)(4) (1988)) (Exh. R-2). In order to abate the violation Gateway was required to either (1) obtain a written waiver from the owner of the occupied building and secure a variance from the State regulatory author-ity, or (2) reclaim the affected areas (Exh. R-2). The abatement was to be completed by May 24, 1982 (Exh. R-2).

On April 26, 1982, Gateway filed an application for review of the NOV contending, inter alia, that it had not violated SMCRA because it had "valid existing rights" to conduct activities in the 100- and 300-foot buffer zones. Gateway filed an application for temporary relief on May 10, 1982, and OSM consented to that request and filed an answer to Gateway's application for review on May 17, 1982. On December 16, 1982, Stout, the owner of the dwelling within the 300-foot buffer zone petitioned for leave

to intervene in proceedings before the Judge, who granted that petition on August 15, 1983.

The matter was scheduled for hearing on January 26, 1984. On January 16, 1984, OSM issued an order purporting to vacate the NOV (OSM Exh. 1), and the January 26, 1984, hearing was canceled. On February 13, 1984, Stout filed an application for review of the notice vacating the NOV, and on February 21, Gateway filed preliminary objections to Stout's application for review. OSM filed its answer to Stout's application on February 27, 1984.

In an April 20, 1984, decision, Judge McGuire rejected OSM's assertion that it had vacated NOV No. 82-1-31-9; found that Stout had a statu-tory right to involvement in the subject proceedings and would be adversely affected if the NOV were vacated without her consent; and reset the hearing. Gateway then filed a motion for reconsideration or, in the alternative, certification of the issue for interlocutory appeal to this Board. Judge McGuire certified the ruling to this Board on May 4, 1984, pursuant to 43 CFR 4.1124 and certification was accepted by order of May 22, 1984. See 43 CFR 4.1272(c).

The Board issued its decision in Gateway Coal Co. v. OSM, 84 IBLA 371 on January 25, 1985. In that decision, we found that when Gateway filed a timely application for review of the NOV, subject matter jurisdiction lodged with the Hearings Division, Office of Hearings and Appeals, and OSM therefore no longer had jurisdiction to vacate the NOV. The case was remanded

to the Judge with instructions to treat OSM's attempt to vacate the NOV as a motion to vacate.

On February 25, 1985, the Judge denied OSM's motion to vacate the NOV, and scheduled an April 30, 1985, hearing on Gateway's application for review. At Gateway's request, a physical inspection of the site was conducted on April 29, 1985 (Tr. 1 at 1-41). OSM and Gateway again filed motions to vacate the NOV with supporting memoranda prior to the hearing, and oral arguments on the motion were presented on April 30, 1985.

The Gateway and OSM motions to vacate were denied. The ensuing hearing on the merits concluded on May 1, 1985. All parties submitted posthearing briefs, and, by order dated July 15, 1986, the Judge suspended consideration of Gateway's application pending promulgation of a final rule defining valid existing rights consistent with this Board's February 25, 1986, order in Valley Camp Coal Co. v. OSM, IBLA 84-632. See Valley Camp Coal Co. v. OSM, 112 IBLA 19, 23-24, 96 I.D. 455, 458 (1989).

On September 27, 1988, OSM filed a motion to lift the stay of proceedings. 3/ The Judge issued a decision on November 25, 1988, denying

3/ A motion to lift the stay was contemporaneously filed in the Valley Camp case, and the Board granted OSM's motion to lift the stay, noting that it had not intended its Feb. 25, 1986, order to preclude consideration of matters involving valid existing rights. See Valley Camp Coal Co. v. OSM, supra at 24-27, 96 I.D. at 458-60. A thorough and accurate recitation of the proceedings leading to this appeal is found in OSM's Answer (OSM Answer) at 1-5. We have adopted much of that recitation.

Gateway's application for review and finding, among other things, that Gateway lacked valid existing rights under the 1979 definition of valid existing rights. He also found that Gateway lacked a property interest in the buffer zone, because its surface lease with Hillman had not been executed until November 15, 1977, which was subsequent to August 3, 1977, the date of enactment of SMCRA. Finding that Gateway "had not been granted approval of its erosion and sediment control plan until August 11, 1977" (Decision at 7), he concluded that Gateway had not satisfied the "all permits test" of the valid existing rights definition appearing at 30 CFR 761.5.

## Arguments on Appeal

Gateway filed a notice of appeal on December 22, 1988, and a Gateway SOR on January 26, 1989. Intervenor Stout filed her brief on February 16, 1989 (Stout SOR), and OSM filed its brief on March 6, 1989 (OSM Answer). Gateway assigns several errors to the Judge's decision, and we address them seriatim.

Gateway maintains that the Judge erred in concluding that Stout's house constitutes an occupied dwelling within the scope of the prohibition of section 522(e)(5) (Gateway SOR at 53-54). The Judge concluded that "[b]ecause intervenor has used the structure as her sole place of residence since the spring of 1967, she is clearly entitled to statutory and regulatory protection" (Decision at 6). Gateway notes that both 30 CFR 761.5 and

the Pennsylvania regulation found at "25 Pa. Code § 86.1," define "occupied dwelling" as any building currently being used on a regular or temporary basis for human habitation (Gateway SOR at 55). Gateway contends that the fact that Stout has resided in her house on a full-time basis since 1967 (Tr. 2 at 193) is not controlling, because both the legislative history of SMCRA and permanent program regulations have emphasized that interpretations of section 522(e) are subject to the property law decisions of the state courts.

Specifically, Gateway relies on the following language from the House of Representatives Conference Report: "[T]he prohibition (against) strip mining * * * is subject to previous state court interpretation * * *. The language of Section 522(e) is in no way intended to abrogate previous state court decisions" (H.R. Conf. Rep. No. 1522, 93d Cong., 2d. Sess. 85 (1974)), and language in the preamble to OSM's 1982 valid existing rights regulations, appearing at 47 FR 25282 (June 10, 1982).

Relying on a Pennsylvania case, Smith v. Penn Township Municipal Fire Association, 323 Pa. 93, 186 A. 130 (1936), interpreting the words "occupied as a dwelling house," Gateway contends that the Pennsylvania Supreme Court held that the general and comprehensive use of the structure is the determinative factor. In Smith, the Pennsylvania Supreme Court affirmed a lower court finding of no coverage under an insurance policy covering structures "occupied as a dwelling house" because Smith lived in a structure which also

housed a bar. The decision held that the mere fact that Smith lived in the structure did not make the structure a dwelling house.

The structure in this case is used to house a full-time antique business which is operated 7 days a week (Tr. 2 at 202, 197-98). Gateway contends that, under Pennsylvania property law, Stout's house is not a dwelling protected under section 522(e) of SMCRA, but is a "building devoted to the systematic operation of a commercial enterprise," citing Smith v. Penn Township Municipal Fire Association, supra at 132.

In response, Stout contends that her undisputed testimony was that she resides in her house on a full-time basis (Tr. 2 at 193) meeting the requirement that the building currently be used on a regular or temporary basis for human habitation (Stout SOR at 9-10). Citing from Smith, she avers "[t]he incidental use of the house as a display case for antiques, given the house's 150 year old history, is not inconsistent with [her] use of the house as a dwelling" (Stout SOR at 10).

[1] Appellant's reliance on the language of the legislative history and the Federal Register notice is misplaced. Neither statement purport-ing to require application of state law was made in the context of defining words contained in the prohibition, e.g., "occupied dwelling." These statements were made in specific reference to the words "subject to valid existing rights" contained in the opening paragraph of 30 U.S.C. § 1272(e) (1988). The thrust of the cited language is designed to ensure that a

state's property law is not abrogated when a document conveying a mineral interest is construed to determine whether the document gives rise to a valid existing right to conduct surface coal mining operations. The statement appearing in the Federal Register was made in the context of document(s) authorizing one to conduct surface mining for purposes of establishing the "ownership" part of the valid existing rights test (47 FR 25281, 25282, June 10, 1982). The portion of that Federal Register notice directed to "occupied dwellings" (47 FR 25282 (June 10, 1982)) makes no reference to state law. Quoting fully, rather than partially, the House Report relied on by Gateway states: "The language 'subject to valid existing rights' in Section 522(e) is intended to make clear that the prohibi-tion of strip mining on the national forests is subject to previous state court interpretation of valid existing rights." (Emphasis added.) When examined in full context, there is no doubt that the cited language has no relevance to defining "occupied dwelling" or other words contained in the prohibition.

Nor is Gateway's analogy to the Smith case persuasive. The terms of the homeowner insurance policy in Smith insured the building "all while occupied as a dwelling house." Coverage was denied because the owner's tenant was conducting an illegal bar business on the premises and the cost to insure a business similarly occupying the premises legally would have been four times that of the insurance premium on the dwelling house. Key to the interpretation espoused in the Smith case was the Pennsylvania

Court's recognition that the cost of insuring a bar or business is not comparable to the cost of insuring a dwelling house.

The Smith court's narrow interpretation of dwelling house and emphasis on the comprehensive use of the structure was reasonable in the context of that case. We have no reason, however, to extend the Smith definition to this case by giving the word "occupied dwelling" a narrow meaning. The regulatory definition of "occupied dwelling" found at 30 CFR 761.5 is

clear and unequivocal -- a dwelling need not be used solely for human habitation -- and Stout's house falls within the purview of the regulatory definition.

Gateway maintains that the Judge erred in failing to find the proceedings moot. The Judge, Gateway contends, erroneously construed its mootness argument as suggesting that the issuance of the valid existing right coal mining activity permit retroactively invalidated the NOV. Gateway reasons that the proceedings were moot because Pennsylvania's regulatory authority had found the structures at the Ruff Creek Facility within the buffer zones not to be subject to the corresponding Pennsylvania buffer zone regulations.

Pennsylvania was granted "primacy" on July 31, 1982 (30 CFR 938.10). Gateway notes that in September 1989, the Commonwealth regulatory authority held that the "structures in the buffer zone were not prohibited under the state regulatory program because they did not fall within the Pennsylvania definition of surface mining activities codified at 25 Pa. Code § 86.1"

(Gateway SOR at 24). On September 28, 1988, Gateway was issued a mining activities permit for its Gateway Mine (Decision at 3; Gateway SOR at 22).

Gateway asserts that the Judge can give no meaningful adjudication in this case (Gateway SOR at 23), and no meaningful relief can be afforded because Pennsylvania has primary authority to regulate surface mining and make valid existing rights determinations. Relying on the Preamble to the OSM Final Rule on Evaluation of State Responses to Ten-Day Notices (TDN), 53 FR 26728, 26737 (July 14, 1988), Haydo v. Amerikohl Mining,Inc., 830 F.2d 494 (3rd Cir. 1987), and In re: Permanent Surface Mining Regulation Litigation, 653 F.2d 514 (D.C. Cir. 1981), Gateway contends that when Congress enacted SMCRA it intended to have a coal operator's compliance measured against the approved State program, rather than directly against SMCRA or OSM's regulatory program.

Gateway maintains that enforcing the NOV after state primacy would be enforcing Federal law in a primacy state, contrary to the intent of Congress in enacting SMCRA (Gateway SOR at 25). According to Gateway, OSM must give the State a TDN of an alleged violation, and OSM may take enforcement action only when the State has failed to take appropriate action, or to show "good cause" for such failure. 30 CFR 842.11(b)(ii)(B), 53 FR 26728, 26744 (July 14, 1988). Gateway notes that, according to the new TDN rules, "an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered 'appropriate action' to cause a violation to be corrected or 'good

cause' for failure to do so. 30 CFR 842.11(b)(1)(ii)(B)(2), 53 FR 26728, 26744" (Gateway SOR at 25). Additionally, it observes "[g]ood cause" includes a finding that the violation does not exist under the State program. 30 CFR 842.11(b)(1)(ii)(B)(4).

Gateway urges a finding that OSM is precluded from taking direct enforcement action absent a TDN (Gateway SOR at 25). It surmises that OSM recognized this fact when OSM issued an order vacating the NOV and then sought to have the Judge vacate the NOV. Gateway thus urges this Board to issue an order vacating the NOV and dismissing these proceedings (Gateway SOR at 27).

[2] Pennsylvania's permanent program obtained primacy on July 13, 1982, and Gateway was granted a State permanent program permit in 1988. Neither of these events operates to divest OSM of its authority to act

upon NOV's issued during the Federal interim program, or divests OSM of its authority to subsequently enforce a previously issued interim program NOV. In Harman Mining Co. v. OSM, 114 IBLA 291, 295 (1990), and in Peabody Coal Co. v. OSM, 101 IBLA 167 (1988), relying on 30 CFR 710.11(a)(3)(iii), we held that state primacy did not excuse an operator from a prior failure to comply with the interim program. The language of 30 CFR 710.11(a)(3)(iii) requires compliance with the interim program until issuance of a permit to operate under a permanent State or Federal regulatory program and does not divest OSM of its authority to redress violations OSM had cited during the interim program. The "until" language in the regulation confirms that the

permanent program permit, and the effects flowing from its issuance, oper-ate prospectively from the date the permit is issued. They do not operate to preclude OSM enforcement of interim program violation citations.

This case arises under the citizen complaint procedures set forth in the interim program. This simply is not an appeal from an OSM decision refusing to order an inspection in response to a citizen complaint under the TDN permanent program procedures. Accordingly, we do not reach and deem it unnecessary to address those issues raised by appellant in the context of OSM's new TDN rules.

[3] Gateway's contention that OSM had the burden of proving that Gateway did not have valid existing rights (Gateway SOR at 16-17) must fail. This Board has consistently held an applicant seeking to take advantage of the valid existing rights exception to application of an act provision bears the burden of proving the existence of the rights giving rise to such entitlement. Valley Camp Coal Co. v. OSM, 112 IBLA 19, 41,
96 I.D. 455, 467 (1989); Blackmore Co., 108 IBLA 1, 8 (1989).

Before addressing the question of whether Gateway has met the valid existing rights test, we note that Gateway maintains that the portions of the Ruff Creek facility located within the buffer zone do not fall within the scope of SMCRA's definition of surface coal mining operations (Gateway SOR at 51, 52). It reasons that, because the lengthy definition of "surface coal mining operations" in section 701(28) of SMCRA (30 U.S.C. § 1291(28)

(1988)) does not include "office buildings, bath-houses and parking areas (very common underground mining surface support facilities)," this definition does not include portions of the Ruff Creek facilities which lie within the buffer zones in question. Id. at 52. This construction, Gateway avers, is supported by the Pennsylvania Department of Environmental Resources (DER) interpretation of the definition of surface coal mining operations when it responded to Gateway's coal mining activity permit application. Gateway notes that in September 1988 DER concluded that the portions of the Ruff Creek facility lying within the buffer zone did not fall within the Pennsylvania definition of surface coal mining operations (Gateway SOR at 52). This was the basis of OSM's attempt to vacate the NOV, according to Gateway, and it urges this Board to defer to OSM's and DER's interpretation on this issue. Id.

Responding to this argument, Stout points to the "broad" definition found at section 710(28) of the Act, 30 U.S.C. § 1291(28) (1988), which, according to Stout, includes "any adjacent land and other areas upon which are sited structures, facilities, or other property and materials on the surface, resulting from or incident to mining activities," and avers the Secretary intended to include all surface disturbances within 300 feet of a residence (Stout SOR at 9).

For its part, OSM states that the broad definition of "surface coal mining operations," as set forth in 30 U.S.C. § 1291(28)(A) and (B) (1988),

encompasses the subject portal building used in connection with an underground mine. Citing 30 CFR 701.5, OSM maintains that it interprets section 701(28) of the Act to include "mine buildings" and "bath houses" within the definition of "surface coal mining operations," and the 1979 Federal definition of valid existing rights is applicable to support facilities (OSM Answer at 16). OSM concedes that when it proposed the rules found at 53 FR 12374, 12378 (Apr. 14, 1988), it requested comments on whether surface coal mining operations not involving the extraction of coal, i.e., support facilities, should be included. Nonetheless, OSM observes that such facilities are currently regulated, albeit pursuant to somewhat different standards. See 30 CFR 817.181 (OSM Answer at 16 n.4).

[4] In Valley Camp Coal Co. v. OSM, supra, we addressed the scope of 30 U.S.C. § 1291(28) (1988), and found "[t]he use of the phrases '[s]uch activities' in subsection (A) and '[s]uch areas' in subsection (B) indicates that Congress did not intend to provide an exhaustive list of activities or areas which meet the definition." 112 IBLA at 30, 96 I.D. at 461. This interpretation is consonant with the language in 30 U.S.C. § 1266(b)(10) (1988) contemplating surface impacts resulting from or incident to underground mining.

The portal building in the instant case contains offices, a first-aid station, a shower room and locker facilities for the coal miners, and a waiting room for miners ready to enter the mine at shift change (Tr. 3 at 29). The offices in the portal facility are used by Gateway's General Manager and support staff (Tr. 3 at 52; Exh. A-9). The additional rooms in

the office building include an engineering and drafting room (Tr. 3 at 52; Exh. A-12), conference room (Tr. 3 at 52; Exh. A-10), and reception area (Tr. 3 at 52; Exh. A-8). Gateway's miners use the portal facility to change and shower before and after shifts (Tr. 3 at 131). The first-aid station at the Ruff Creek portal is significantly closer to present mine workings than the old Grimes portal location, thus affording more immediate first aid (Tr. 3 at 47, 53; Exh. A-13).

Miners enter the mine by going from the waiting room to the elevator in the intake shaft located adjacent to the portal facility, but outside the 300-foot buffer zone (Tr. 3 at 10). The hoisting facility lowers miners into the mine workings (Tr. 3 at 29, 30). Having the portal facility at the Ruff Creek site significantly reduces underground travel time to the mine face, allowing miners to devote more of their shift time to producing coal (Tr. 3 at 32, 131). A portion of the parking lot is used by Gateway miners to park their vehicles while on their shift.

To the extent that DER concluded that Gateway did not need a permit to erect the building and construct the parking lot within the buffer zones because the administrative offices found at Ruff Creek were no different than those located in Washington, Pennsylvania (which would not normally be considered part of the coal mining operations), DER's conclusion fails to withstand reasoned analysis. If the building in question were erected for the sole purpose of housing administrative support facilities, the DER conclusion may well have merit. In fact, however, the miner's change and waiting room, showers and lockers, the nurse's office, and a portion of

the miner's parking lot are within the 100- and 300-foot buffer zones. There can be no serious contention that these facilities are anything other than "incident to" underground mining. The building and parking lot are subject to the applicable SMCRA or Pennsylvania permanent program permit-ting requirements even though they also serve as administrative support facilities. The record fully supports the conclusion that the Ruff Creek portal facility exists to support and is "incident to" Gateway's underground mining of the Pittsburgh seam.

Gateway next argues that the Judge failed to use the "good faith effort to obtain all permits" revision to the regulatory definition adopted by OSM in its August 4, 1980, notice (45 FR 51547, 51548) suspending the "all permits" portion of the regulatory definition, and failed to employ the "needed for and immediately adjacent to" test of the OSM definition.

Gateway also insists that the Judge improperly applied Federal and State regulatory property rights tests when finding that Gateway lacked sufficient property interests for valid existing rights. Gateway avers that its mining rights under the 1962 lease included the right to construct the support facilities in question, and, in the alternative, that the 1975-77 correspondence between Hillman and Gateway established an enforceable State law property right to construct the Ruff Creek Facility on the Smadbeck tract well before August 3, 1977.

Addressing the 1962 lease, and relying on Schuster v. Pennsylvania Turnpike Commission, 395 Pa. 441, 149 A.2d 447 (1959), Gateway argues that

the common law in Pennsylvania since 1854 has been that one possessing the right to mine coal has the implied right to use so much of the overlying surface "as is necessary to the conduct of underground mining operations" (Gateway SOR at 31). Gateway quotes extensively from McMillen v. Rochester & Pittsburgh Coal Co., 21 Pa. D. & C.3d 371 (1973), which states:

> It has been repeatedly held by Pennsylvania courts that a grant of coal carries with it the right to do all things necessary and reasonable for the full use of the grantee's estate in the coal. In Turner v. Reynolds, 23 Pa. 199, 206 (1854) it is stated as follows: "One who has the exclusive right to mine coal upon a tract of land has the right of possession [of the surface] even as against the owner of the soil, so far as it is necessary to carry on his mining operations." In Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 296, 25 Atl. 597 (1893), it is stated as follows: "As against the owner of the surface each of the several purchasers [of mineral estates] would have the right, without any express words of grant for that purpose, to go upon the surface to open a way by shaft, or well, to his underlying estate, and to occupy so much of the surface, beyond the limits of this shaft, drift, or well, as might be necessary to operate his estate, and to occupy so much of the surface, beyond the limits of his shaft, drift, or well, as might be necessary to operate his estate, and to remove the product thereof." In Baker v. Pittsburgh, Carnegie & Western, R. R. Co., 219 Pa. 398, 404, 68 Atl. 1014 (1908), it is stated as follows: "An express grant of all the minerals and mining rights in a tract of land is by natural implication the grant also of the right to open and work the mines, and to occupy for those purposes as much of the surface as may be reasonably necessary." In Oberly, et al. v. Frick Coke Co., 262 Pa. 80, 89, 104 At. 864 (1918), it is stated, inter alia, as follows: "The removal of gas is a necessary incident to the mining of coal in order that mining operations may be carried on with safety. It is one of the implied rights incident to every grant of minerals." In New Charter Coal Co. v. McKee, 411 Pa. 307, 191 A.2d 830 (1963), it is stated upon page 313 as follows: "Where there is a clear right to deep mine coupled with a waiver of the right to support of the surface one does not have to be a mining expert to deduce that the owner of the coal has the power to sink as many shafts as he chooses and to come as close to the surface as he chooses to dig and remove all and every particle of the coal granted to him, without any responsibility as to the effect of his operations on the usability of the surface."

(Gateway SOR at 31-32).

Relying on Schuster and Turner v. Reynolds, supra, Gateway contends that, when the dispute is between the person holding the right to mine coal and a third party, who is not the surface owner, it is presumed that any related use of the surface is necessary for operation of the mine. Gateway insists that when this principle is applied to the dispute between Gateway, Stout, and OSM, Gateway's use of the surface of the Smadbeck tract is presumed to be necessary to the operation of the Gateway Mine (Gateway SOR at 32). It further contends that the evidence supports a finding that the Ruff Creek facility is necessary to the operation of the Gateway Mine.

Gateway insists that, as the lessee of the coal underlying the Smadbeck tract, it has held a valid property right under Pennsylvania common law since execution of the 1962 lease because it has continually held the right to the reasonable use of the surface of the Smadbeck tract for facilities supporting Gateway Mine underground operations (Gateway SOR at 33). Gateway relates that mining rights such as those granted by the 1962 lease have been construed to permit use of the surface reasonably necessary to operate the mine. By way of example, Gateway refers to United States Steel Corp. v. Hoge, 503 Pa. 146, 468 A.2d 1386 (1983), finding that a mining rights clause, which included the right to ventilate, granted the right to occupy the surface and drill wells to recover coal bed gas from the coal seam. See also Oberly v. Frick Coke Co., supra. In Baker v. Pittsburgh, Carnegie & Western R. R. Co., supra, a general reservation of underlying coal and all mining right and privileges appurtenant thereto reserved the right to go

upon the land and sink a shaft to the coal seam. In McMillen v. Rochester & Pittsburgh Coal Co., supra, a grant of mining rights including the right to erect such chutes, tipples, buildings, and other structures as may be necessary in operation of the mine gave the coal owner the right to construct a ventilation shaft and erect a fan on the surface.

In its 1962 lease, Hillman granted mining rights, with "all reasonable privileges for ventilating, pumping and draining the mines" (Exh. A-19 at A-63). Citing Oberly v. Frick Coke Co., supra, as controlling, Gateway asserts that, under Pennsylvania law, the grant of specific mining rights does not limit the general implied right of necessary use of the surface, unless the grant specifically provides otherwise. Gateway reasons that, under Pennsylvania law, it acquired the right to reasonable use of the surface of the Smadbeck tract in 1962 when it was granted the right to mine the underlying coal. It contends that this conclusion is further supported by the reservation clause in the 1964 deed from Smadbeck to Hillman which contains specific language excepting and reserving all coal underlying the tract, together with the mining rights and privileges appurtenant thereto (Exh. A-20 at 2; Tr. 2 at 249). 4/ These reserved rights were the subject of a pre-1962 conveyance of the mining rights to Hillman, according to Gateway (Gateway SOR at 39).

Gateway notes that the Pennsylvania Supreme Court has specifically held that the right to reasonable use of the overlying surface land

4/ Title to the coal underlying the Smadbeck tract and title to the surface came to Hillman through different chains of title (Tr. 2 at 299).

constitutes both a "property right" and "an interest in the overlying land." Schuster v. Pennsylvania Turnpike Commission, supra at 454. Thus, it urges a finding that the legal right granted to it in 1962 is sufficient to satisfy the property right test for both the 1980 OSM definition and the Pennsylvania definition of valid existing rights (Gateway SOR at 35). Gateway further refers to subpart (c) of the definition of valid existing rights appearing at 30 CFR 761.5, effective April 2, 1982. This section states:

> (c) Interpretation of the terms of the document relied upon to establish valid existing rights shall be based upon the usage and custom at the time and place where it came into existence and upon a showing by the applicant that the parties to the document actually contemplated a right to conduct the same underground or surface mining activities for which the applicant claims a valid existing right.

Gateway avers that the mining rights granted to it by the 1962 lease are customarily interpreted and intended to include the right to reasonable use of the surface for facilities to support underground coal mining operations. Specifically, "Hillman and Gateway contemplated the right of Gateway to use the surface overlying the Gateway mine to construct a portal and ventilation shafts" (Gateway SOR at 35).

Gateway notes that, under the 1962 lease, it was obligated to provide Hillman with maps projecting future mining (Tr. 2 at 233), and the 1962 projection submitted to Hillman portrayed the Smadbeck tract as a future site for portals of ventilation shafts (Tr. 2 at 238, 243). Hillman purchased the Smadbeck tract in 1964 for use as a portal and ventilation

shafts site for the Gateway Mine (Exhs. A-21 and A-22). Gateway contends that, considering this fact, there is little doubt that the parties to the 1962 lease contemplated using the Smadbeck tract for surface support facilities (Gateway SOR at 36-37).

Gateway asserts that 52 P.S. § 1396.4(a)(2) (1966) (Supp. 1988) provides additional support for its argument that, under Pennsylvania law, the mining rights acquired by Gateway under the 1962 lease included the right

to reasonable use and access to the surface overlying the leased coal. It notes, specifically, that under section 1396.4(a)(2)F (1966) (Supp. 1988), bituminous coal operators are not required to submit landowner consent of entry forms when filing permit applications for surface mining operations, including surface support facilities for underground mines, when the application is based on leases in existence on January 1, 1964. In those cases, an applicant need only submit a description of the documents creating its right to enter upon surface land and conduct mining activities. Gateway suggests that the use of a description of the documents creating the applicant's right to enter upon surface land and conduct surface mining activities as a substitute for a landowner's consent form is evidence of Pennsylvania's recognition of the effect of granting mining rights like those obtained by Gateway in 1962. OSM, Gateway notes, recognizes "[t]his same concept of relying upon documentation to establish the right of applicant to enter upon land and conduct surface coal mining activities is recognized at 30 CFR § 778.15 (right-to-entry information)" (Gateway SOR at 39).

Gateway asserts a separate and independent basis for the existence of a valid existing right "to use the Smadbeck Tract for surface support facilities for the Gateway Mine." This separate basis is found in the Hillman and Gateway actions and letters during the period between 1975 and early 1977. Relying on the "other document" language of the 1980 property rights definition, Gateway submits that, under Pennsylvania law, the letter of February 14, 1975, from Hillman to Gateway's partner, J&L (Exh. A-25), the letter of June 23, 1977, from Gateway to Hillman (Exh. A-31), and the letter of July 15, 1977, from Hillman to Gateway (Exh. A-34), constitute sufficient written documentation to vest an additional property right to use the Smadbeck tract for surface support facilities for the Gateway Mine. Blandford, the Hillman representative with whom Gateway communicated on this matter, testified that there was an oral agreement to lease the Smadbeck tract in the early part of 1977 (Tr. 2 at 266), and this oral lease agreement was ultimately reduced to writing on November 15, 1977 (Exh. A-34) (Gateway SOR at 40-41). According to Gateway, the letters prior to August 3, 1977, were sufficient to create an enforceable lease between Hillman and Gateway and must be viewed as sufficient written documents to satisfy the property right test for establishing valid existing rights (Gateway SOR at 41).

Employing the statute of frauds 5/ to demonstrate that the letters were sufficient written documents to create an enforceable lease prior

5/ Gateway acknowledges that reference to statute of frauds is unusual in this context because this doctrine is normally available only to a party to the agreement in question, citing Civic Center Investors Corp. v. Republic Insurance Co., 59 Pa. D. & C.2d 105 (1971) (Gateway SOR at 41 n.10). There is no dispute between Hillman and Gateway on this point.

to August 3, 1977, Gateway relates that, under the Pennsylvania statute (68 P.S. § 250.202), leases for more than 3 years must be in writing, (Gateway SOR at 41).

Gateway states that Pennsylvania case law interpreting the statute of frauds supports its contention that the June 23 and July 15, 1977, letters satisfy the writing requirement of the statute and validate the oral agreement (Gateway SOR at 43). It notes that, under Pennsylvania case law,

the written document need not be a contract (Brown v. Hahn, 419 Pa. 42, 213 A.2d 342 (1965)) and may consist of one or several documents (Williams v. Stewart, 194 Pa. Super. 601, 168 A.2d 729 (1961)), and designation of

the property in general terms is sufficient. Gateway concedes that "[w]hat is required is a memorandum containing a description of the property, the consideration and the signature of the party charged. American Leasing v. Morrison Co., 308 Pa. Super. 318, 454 A.2d 555 (1982)" (Gateway SOR at 43). Noting that parole evidence may be used to gain a more precise description (Sawert v. Lunt, 360 Pa. 521, 62 A.2d 34 (1948)), Gateway claims the June 23 and July 15 letters adequately describe the property:

> Gateway's letter sets forth a proposed term of [the] lease of at least 25 years and requests to be informed of the consideration that will be required. In response Hillman sets the consideration at $1,500 per month and agrees to any term of lease required by Gateway [and] [t]he letter is signed by the president of Hillman.

(Gateway SOR at 43-44). Gateway concludes that the basic elements necessary to satisfy the statute of frauds existed on July 15, 1977.

For her part, Stout contends that the Judge correctly determined that the surface lease was not executed until November 15, 1977 (Exh. A-34),

and argues that it was "that document alone that gave Gateway the legally binding conveyance of the right to enter upon the surface of the land

and use it for mining operations" (Stout SOR at 5). Stout charges that Gateway's allegation that its right to mine the coal underground gave it the right to use the surface wherever it pleases is the exact problem Congress sought to eliminate with SMCRA, noting that many surface mining operations disturb surface areas in a way that adversely affects the public welfare by destroying or diminishing the utility of land for residential purposes, citing 30 U.S.C. § 1201(c) (1988). Stout disputes Gateway's

claim that the letters gave rise to a legally enforceable right to use the Smadbeck tract, contending that comparing the lease and the several letters expose Gateway's contentions as meritless. In conclusion, Stout avers that valid existing rights "does not mean mere expectation of a right to conduct surface coal mining operations or the right to conduct underground coal mining" and states that examples of rights which alone do not constitute valid existing rights include coal exploration permits, licenses, applications, or bids for leases (Stout SOR at 7; emphasis in original).

OSM contends that the Judge, Gateway, and Stout have all missed the issue. Initially, OSM contends that

> [s]ince the right to production of coal is not at issue in this case, the document granting the right to the coal is not the essential document in this matter. Rather, the right at issue is the right to use the surface within the statutory buffer zones established by
>
> SMCRA.

(OSM Answer at 17). OSM contends that Hillman satisfied the property rights test found in the 1979 definition of valid existing rights because it owned the surface upon which the Ruff Creek portal was built. OSM notes that Hillman had acquired this tract by a legally binding conveyance which, on its face, authorized the "surface coal mining operations" at issue. According to OSM, having acquired these rights prior to enactment of SMCRA, Hillman could transfer these rights to Gateway after the date of enactment, and thereby satisfy the property right portion of the definition.

OSM urges an interpretation of the 1979 definition that would require only that the right to conduct the surface coal mining operations at issue existed on August 3, 1977, and at the time of the mining, the operator possessed the right to conduct the mining operations. OSM asserts "that there is no requirement that the operator desiring to exercise the subject property rights actually have had them prior to August 3, 1977." OSM notes that the Secretary clarified this point in a notice published in the Federal Register at 53 FR 52378 (Dec. 27, 1988). Thus, OSM reasons that, to establish a valid existing right, the party need only have the right to conduct the surface coal mining operation at issue on August 3, 1977 -- the valid existing right can be transferred after that date. OSM contends that Hillman's transfer of surface property rights also transferred the right to construct portions of Gateway's portal building and parking lots within the 100- and 300-foot buffer zones (OSM Answer at 17-18).

[5] In Valley Camp Coal Co. v. OSM, supra, OSM issued an NOV for stockpiling coal within 100 feet of a road, in violation of

section 522(e)(4) of SMCRA, 30 U.S.C. § 1272(e)(4) (1988). The NOV had issued on May 12, 1980, which was prior to the date (January 1981) West Virginia obtained State program approval. In Valley Camp, the Board quoted an order issued earlier in the same case reiterating our refusal to employ the definition of valid existing rights found in the State program, stating:

> As the State program was not approved when the NOV was issued we are not persuaded that the State definition is applicable in this case. * * * [T]he Board is of the opinion that the definition of "valid existing rights" to be applied herein is the one in effect at the time the NOV was issued. Thus, in determining whether Valley Camp has valid existing rights to stockpile coal in violation of section 522(e)(4), the Board will apply "the 1979 test, including the 'needed for and adjacent' test, as modified by the August 4, 1980, suspension notice which implemented the District Court's February 1980 opinion in In Re: Permanent (I) [14 E.R.C. 083 (D.D.C. 1980)]." 51
>
> FR 41954 (Nov. 20, 1986).

Id. at 28, 96 I.D. at 460, citing Order dated May 11, 1989, at 5-6.

The NOV served on Gateway was issued on April 2, 1982. Adhering to the rationale set out in Valley Camp, we will employ the definition of valid existing rights in effect when the NOV was issued -- the 1979 definition, as modified by the August 4, 1980, suspension notice. Under that definition, valid existing rights means:

> (a) Except for haulroads,
> (1) Those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorized the applicant to produce coal by a surface coal mining operation; and
> (2) the person proposing to conduct surface coal mining operations on such lands either
> (i) Had been validly issued, on or before August 3, 1977, all State and Federal permits necessary to conduct such opera-tions on those lands, or

> (ii) Can demonstrate to the regulatory authority that the coal is both needed for, and immediately adjacent to, an on-going surface coal mining operation for which all mine plan approvals and permits were obtained prior to August 3, 1977[.]

Valley Camp Coal Co. v. OSM, supra at 39-40, 96 I.D. at 467.

In In re: Permanent Surface Mining Regulation Litigation (I), 14 E.R.C. 1083, 1091 (D.D.C. 1980), Judge Flannery remanded the "all permits" test (30 CFR 761.5(a)(2)(i)) to the Secretary, and indicated that a "good faith attempt to obtain all permits before the August 3, 1977, cut-off date should suffice for meeting the all permits test." The Secretary subsequently modified the definition of valid existing rights found at 30 CFR 761.5(a)(2)(i):

> To comply with the court's 1980 opinion, [OSM] suspended the definition only insofar as it required that to establish
> [valid existing rights] all permits must have been obtained
> prior to August 3, 1977 (45 FR 51547, 51548, August 4, 1980).
> The notice of suspension stated that, pending further rulemaking, [OSM] would interpret the regulation as including the court's suggestion that a good faith effort to obtain permits would establish [valid existing rights].

51 FR 41954 (Nov. 20. 1986).

Thus, for Gateway to have valid existing rights, it must demonstrate: (1) that on August 3, 1977, it posessed the property rights authorizing the creation of the surface disturbances in question; and (2) that it had either obtained all State and Federal permits necessary to conduct such operations prior to August 3, 1977, or had made a good faith effort to obtain all permits necessary to conduct such operations prior to that date. As applied to

this case, the "operations" we must examine are those surface impacts within the buffer zones. The two questions thus posed are: (1) did Gateway have all permits necessary to create the surface impacts within the buffer zone (i.e., portal building, parking lot and electrical facilities (substation)) prior to August 3, 1977; and (2) has Gateway demonstrated good faith efforts to obtain any necessary permit not obtained prior to August 3, 1977.

The Judge employed the all-permits test and therefore did not consider whether Gateway had exerted good faith efforts to obtain all necessary permits when he found that Gateway did not have valid existing rights on August 3, 1977. To the extent he failed to employ the "good faith efforts to obtain all permits" test, his decision is flawed. 6/

Gateway states that the Judge's failure to apply the correct test in no way affected his subsidiary finding that the only permits necessary for the construction of the Ruff Creek Facility structures and features located in the buffer zones were a Surface Support Permit and an Erosion and Sedimentation Control (E&S) Plan Approval (Gateway SOR at 30). Gateway asserts that it obtained the Surface Support Permit on April 4, 1977 (see Exh. A-44) and made a good faith effort to obtain the E&S Plan approval prior to August 3, 1977 (Tr. 3 at 170-72; Exh. A-45). Gateway notes that it applied for plan approval on June 16, 1977 (Tr. 3 at 170), and submitted

revisions to the application requested by the U.S. Soil and Conservation Service (USSCS) on July 22, 1977, at which time it specifically requested

6/ The Judge's application of this more stringent standard is understandable. His decision issued prior to this Board's May 11, 1989, order in Valley Camp requiring application of the good faith efforts test.

prompt action on the application (Tr. 3 at 170). The application was approved on August 11, 1977 (Exh. A-45), 8 days after the enactment of SMCRA.

Stout responds that mining had not progressed to this specific tract as of April 4, 1977 (the date of the mine subsidence permit (Tr. 3 at 296-97)), and Gateway's witness admitted that the application for the drainage permit was dated September 12, 1977 (Tr. 2 at 301). In support of the argument that Gateway had not obtained all permits, Stout refers to a January 17, 1978, DER letter stating that Gateway's permits were lacking.

[6] We do not believe the evidence supports a finding that Gateway was required to obtain a Surface Support Permit to create the surface impacts within the buffer zone. Notwithstanding the obvious fact that Gateway was required to obtain a Surface Support Permit to construct the shaft and conduct underground mining, neither of the activities giving rise to the need for the Surface Support Permit impacts the lands within the buffer zones.

Even if we were to assume error in this conclusion for the sake of argument, we find Gateway has demonstrated that it had either obtained or made a good faith effort to obtain the Surface Support Permit prior to August 3, 1977. Gateway has maintained throughout these proceedings that the DER Surface Support Permit it obtained on April 4, 1977, includes the Ruff Creek portal facility site (Tr. 3 at 167-69; Exh. A-44). Gateway acknowledges that, as a condition of the permit, it must submit new mine

plans or projections describing where they expect to be in the next 6 months (Tr. 3 at 295, 298, 341). Gateway's Hanley explained on redirect examination:

> A six month projection is basically a requirement of the Department of Mine Subsidence that requires us to send in a mine map at 200 foot to the inch scale in our particular case showing all the workings as they currently exist in the mine, and projected over the next six months area where the area delineated on those maps wherein we will be mining within the next six months.
>
> And we show whether it is development mining, that is, initial driving of the entries or retreat mining where we are recovering the blocks of coal that previously [have] been developed.
>
> And it shows any protected dwelling, protected under the subsidence laws, it shows them on the map, along with highways and other surface features.
>
> And what protective support measures we are taking to leave support for any protected structures.

(Tr. 3 at 340-41).

Gateway contends that the individual 6-month projections are not permits, but reports filed pursuant to a permit issued prior to August 3, 1977. It argues that "under the terms of the Surface Support Permit we must file them every six months" (Tr. 3 at 341). According to Gateway, the updated projection map filed before the April 4, 1977, permit was issued had been filed in January, and the one after permit issuance would have been mailed May 1, 1977 (Tr. 3 at 343). It notes that the 6-month projection map filed before permit issuance did not encompass mining in the Ruff Creek area because Gateway's mining had not yet advanced to the

Ruff Creek area (Tr. 3 at 344). Stout does not dispute Gateway's statement that the portal facility area was covered by subsequent 6-month projection maps.

An examination of the Surface Support Permit statute, found at 52 Pa. Cons. Stat. § 1406.1 (1966) (Supp. 1990), confirms Gateway's statement that new permits are not created each time a 6-month projection map is filed and approved. Such filings are not permit applications. Rather, the periodic filing of such maps fulfills a continuing obligation or condition under the permit, and is necessary to maintain the permit in force and effect. There has been no showing that, as of August 3, 1977, Gateway had not complied with any permit condition, including the required filing of the 6-month projection maps.

The fact that the projection map filed immediately before August 3, 1977, did not include the lands embraced in the buffer zone is not dispositive. To require this result would be to hold that, in Pennsylvania,

the existence of valid existing rights turns on whether an operator had expressed an intent to affect the surface incident to an underground mine within 6 months of August 3, 1977, by filing a mine projection map under the Pennsylvania statute. Gateway obtained a Surface Support Permit covering the entire mine in April 1977 and had filed all necessary projection maps

on August 3, 1977. The record demonstrates that on August 3, 1977, Gateway had obtained the necessary Surface Support Permit for the buffer zone in question.

The E&S Plan "is designed to ensure that construction activities on the surface will not result in excessive erosion and sedimentation" (25 Pa. Code Chapter 102 (OSM Answer at 20)). Approval of the E&S Plan is obtained from the USSCS, and "[a]pproval of this plan * * * is the first step to obtain a water quality management permit from the Pennsylvania Department of Environmental Resources" (Tr. 3 at 171). 7/ The E&S Plan permit application embracing the impacts within the buffer zone was filed on June 16, 1977 (Tr. 3 at 170). The cover letter transmitting the application noted that E&S plan approval was necessary to obtain a Mine Drainage Permit, and stated that Gateway "wish[ed] to submit an Application for [the Mine Drainage Permit] to DER as soon as possible in order to get construction work started" (Tr. 3 at 171; Exh. A-45 at 2). Exhibit A-45 dated July 7, 1977, contains the report of an onsite investigation by USSCS in which USSCS recommended that Gateway supplement and revise its E&S plan. By transmittal letter and enclosures dated July 22, 1977, Gateway responded by supplementing and revising that Plan (Exh. A-45 at 8; Tr. 3 at 171-72). The E&S Plan was approved on August 11, 1977, 7 days after the effective date of SMCRA (Exh. A-45 at 14). The E&S Plan was a "permit" which Gateway was obligated to obtain before creating the challenged surface impacts. Gateway did not hold that permit on August 3, 1977, but it is clear that Gateway was making a good faith effort to obtain approval of its E&S Plan on August 3, 1977, and thus satisfied the permits portion of the valid existing rights definition with respect to this permit.

7/ The water quality management permit is also commonly referred to as the Mine Drainage Permit (Tr. 3 at 171).

After receiving approval of the E&S Plan, Gateway filed an addendum to its "Permit No. 3071302" Mine Drainage Permit Application No. 3077304, on September 12, 1977 (Exh. A-46 at 4). The "purpose of the [Mine Drainage Permit] Application [was] to receive a permit for discharging ground water intercepted by the excavation of the proposed [Ruff Creek] shafts" (Exh. A-46 at 6). Both shafts and the point of discharge for which the permit was sought lie outside the buffer zone. Consequently, it was not necessary for Gateway to obtain (or use its best efforts to obtain) the Mine Drainage Permit, as the surface impacts covered by that permit are located outside the buffer zone (Tr. 3 at 173). Nor was Gateway required to obtain a Mine Drainage Permit to create the surface impacts lying within the buffer zone. Because Gateway has demonstrated good faith efforts to obtain all necessary permits for the creation of the surface impacts within the buffer zone, we need not reach the issue whether the "coal is needed for, and immediately adjacent to, an ongoing surface coal mining operation".

We now turn to the portion of the 1979 definition requiring property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract, or other document which authorized the applicant to produce coal by a surface coal mining operation. Paragraph (a)(1) of 30 CFR 761.5 does not merely require that one demonstrate a property right to mine a specific tract. There must be an existing right to produce coal "by a surface coal mining operation."

The term "surface coal mining operation[s]" is defined by SMCRA, section 701(28), 30 U.S.C. § 1291(28) (1988), which provides, in part:

(28) "Surface coal mining operations" means--

(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements
of section 1266 of this title surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. [Emphasis supplied.]

In turn, Section 576(b)(10), 30 U.S.C. § 1266(b)(10) (1988), provides:

(10) with respect to other surface impacts not specified in
this subsection including the construction of new roads or the improvement or use of existing roads to gain access to the site
of such activities and for haulage, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities, operate in accordance with the standards established under sec-tion 1265 of this title for such effects which result from sur-face coal mining operations: Provided, That the Secretary shall make such modifications in the requirements imposed by this sub-paragraph as are necessary to accommodate the distinct difference between surface and

underground coal mining;

[7] Initially, we observe that while proof of a property right to strip mine and the property right "to produce coal by a surface mining operation," are the same, this comparison does not hold in the context of underground mining. The right to create surface impacts incident to mining may be granted by a "legally binding conveyance, lease, deed, contract or other document," or that right may be implicit in the right to underground mine under applicable state law. In either case, proof of a right to create surface impacts incident to underground mining is not established by mere proof of a right to mine coal under a specific tract by use of underground mining methods.

The question of whether a legal document between two private parties creates the right to cause the surface disturbance is dependent upon the application of state law. This reliance on state law is appropriate in light of the congressional expression that determinations of property rights for valid existing rights purposes should not abrogate state law

and state court decisions (H.R. Rep. No. 218, 95th Cong., 1st Sess. 95 (1977)) and references found in the legislative history to United States

v. Polino, 131 F. Supp. 772 (N.D. W.Va. 1955). Thus, in the context of underground mining, the inquiry to be made is whether property rights in existence on August 3, 1977, authorized the creation of the specific sur-face impacts incident to the applicant's underground mining operation.

We find the language of 30 CFR 761.5(e) to be helpful in this case. 8/ This regulation provides:

> (e) Interpretation of the terms of the document relied upon to establish the [valid existing] rights to which the standard of paragraphs (a) and (d) of this section applies shall be based either upon applicable State statutory or case law concerning interpretation of documents conveying mineral rights or, where no applicable State law exists, upon the usage and custom at the time and place it came into existence.

In determining whether, on August 3, 1977, Gateway had property

rights authorizing it to create the challenged surface impacts within the 100- and 300-foot buffer zones, incident to underground mining, we turn

8/ The few valid existing rights cases to date have applied the predeces-sor of 30 CFR 761.5(e), 30 CFR 761.5(b)(2)(c) (1982), in the context of surface mining valid existing rights determinations rather than in underground mining valid existing rights determinations. The regulations on their face, however, appear to be applicable in both contexts.

to Pennsylvania law as it relates to the documents in existence prior to August 3, 1977.

Pennsylvania law recognizes three estates in land -- coal, surface, and right of support. In cases where the estates have never been severed and those in which the severed estates are later merged, the ownership of

the combined estates would establish the right to produce coal by surface coal mining operations. In this case, the surface and coal estates had been severed, however, and there is no evidence of a subsequent merger of title. Therefore, we must examine Pennsylvania law applicable to the rights conveyed when the rights to the coal and the surface rights are severed. Had the grant to Gateway been limited to a right to mine coal under a tract of land, Pennsylvania law, by implication, would have construed the grant of that right to include the right to use of so much of the surface as was necessary to carry on and accomplish the work of mining and extracting coal from beneath the surface of the land. Schuster v. Pennsylvania Turnpike Commission, supra.

To the best of our knowledge, Schuster v. Pennsylvania Turnpike Commission remains the leading authority in Pennsylvania on this issue. In Schuster, the Pennsylvania Turnpike Commission condemned a 200-foot right-of-way for proposed construction of the Northeast Extension of the turnpike. The right-of-way embraced acreage which was the subject of an oral agreement between Schuster and Moffat (the owner of the property) authorizing Schuster and his wife to mine the coal to exhaustion under a 65-acre tract. At the time of condemnation Moffat owned all three estates, the coal (presuming

the oral agreement was not a sale of the coal), surface, and the right to support. Thus, the issue before the Pennsylvania Supreme Court was whether, exclusive of Moffat's ownership, the Schusters had any property right or interest in the tract of land which was directly affected by the Commission's condemnation so as to entitle them to compensation. At the time of condemnation Schuster had driven a slope from the surface to the coal, built several roadways, and had erected several buildings including a cap house, steel garage, warehouse, powder house, oil house, and hoisting engine house.

The Commission contended that only the "land" was taken, and the Schusters neither owned the land nor a property interest in the land entitling them to compensation. The Pennsylvania Supreme Court found a property right in the surface of the land implicit in the right to mine, stating:

> The owner of the coal--Moffat--through his authorized agent
> gave Schusters the right to mine all the coal to exhaustion in a certain vein under a 65 acre tract of land. While nothing was expressly stated in the oral agreement, by implication Moffat
> thus gave Schusters the use of the surface of such tract of land to the extent that such use was necessary to carry on and accomplish the work of mining and extracting coal from beneath the surface of such land. Such a principle has been long recognized in Pennsylvania. In 1854 in Turner v. Reynolds, 23 Pa. 199, 206, this Court said: "One who has the exclusive right to mine coal upon a tract of land has the right of possession even as against the owner of the soil, so far as it is necessary to carry on his mining operations * * *. As against an intruder * * * we will presume that the possession of the soil was requisite, in order
> to enable the plaintiffs to avail themselves of their mining privileges." To the same effect Trout v. McDonald, 83 Pa. 144, 146; Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 296, 25 A. 597, 18 L.R.A. 702; Baker v. Pittsburgh, Carnegie & Western Railroad Company, 219 Pa. 398, 403, 68 A. 1014; Oberly v. H. C. Frick Coke Company, 262 Pa. 83, 86, 87, 88, 89, 104 A. 864; Friedline v. Hoffman, 271 Pa. 530, 534, 535, 115 A. 845; Dougherty v. Thomas, 313 Pa. 287, 295, 296, 169 A. 219. Schusters acquired by the agreement the right not only to the coal under this land but the right to the use of so much of the surface of the land

> as was necessary to the conduct of their mining operations. The Commission does not claim that the extent of the surface of
> this tract of land actually occupied by the buildings, etc. of Schusters was not necessary to the mining operations; on the contrary it will be presumed as against the Commission, a stranger
> to the agreement that such use as exercised was necessary. Schuster's right was not only a "property right" but an "interest in the land" [Emphasis in original and supplied; footnote omitted.]

Schuster v. Pennsylvania Turnpike Commission, supra at 453-54.

Rejecting arguments that the right granted was either a "tenancy at will" or a "mere license to take the coal" under Pennsylvania law, the Court concluded:

> [t]he law is long and well settled in Pennsylvania that "The grant of a right to mine coal in the lands of the lessor, and remove it therefrom, although the instrument may be called a 'lease,' is a grant of an interest in the land itself, and not a mere license to
>
> take the coal."

Id. at 454-55, citing Shenandoah Burough v. City of Philadelphia, 37 Pa. 180, 186, 79 A.2d 433, 436.

Schuster is fully consistent with other Pennsylvania Supreme Court decisions addressing rights inherent or implied in the right to mine and remove coal. Oberly v. H.C. Frick Coke Co., supra; Friedline v. Hoffman, supra; Baker v. Pittsburgh, Carnegie & Western Railroad Co., supra.

Moreover, under Pennsylvania law, the "character and extent" of the rights appurtenant to the right to mine and remove coal, whether express or

implied, exist to the full extent that they are not altered by express provision. Oberly v. H. C. Frick Coke Co., supra at 865.

As can be seen, under Pennsylvania law the mineral estate's right to use the surface estate is dominant to the extent the use is necessary for removal of the underlying minerals. Schuster and the authorities cited therein provide ample authority for this proposition. This broad authority to use so much of the surface as is necessary to conduct the underground operations is not unlimited, however. We must therefore examine those limitations.

We know of no cases extending this implied right to the use of the surface estate for production of minerals underlying lands other than those conveyed by the grantor. 9/ A conveying party may, of course, expressly

grant such a right in the document severing the mineral estate from the

surface estate, but there is no evidence of this being the case here, as

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9/ In Oberly v. H.C. Frick Coke Co., supra, the Pennsylvania Supreme Court stated:

"It is a general rule of law that when anything is granted, all
the means of attaining it and all the fruits and effects of it are also granted; when uncontrolled by excess words of restriction all the powers pass which the law considers to be incident to the grant or the full and necessary enjoyment of it. Consequently, a grant or reservation of mines gives the right to work them, to enter and to mine unless the language
of the grant itself provides otherwise or repels this construction. And this right is so inseparable from a grant of minerals, that not only is
it necessarily an implied incident thereof, but it and its derived rights cannot be restrained or excluded by a special affirmative power to do
other acts, or by a grant of other privileges necessary or convenient to
the working of mines.

"The right to work the mine involves the right to penetrate the surface of the soil for the minerals, to remove them in the manner most advantageous to the mine owner, and to use such means and processes in mining and removing them as may be necessary in the light of modern improvements in the arts and science * * *.

the document severing the Smadbeck mineral estate from the surface estate was not placed in evidence. Consequently, we have no knowledge as to whether the severance document expressly granted the right to use the surface for removal of minerals from other tracts or only granted those rights normally implied at law. The absence of the severance document is doubly vexing because the Gateway Mine is extensive, and we are unable to ascertain the actual size and shape of the surface estate at the time of severance. This factor is important because subsequent partial surface conveyances would not alter or destroy the right to use any part of the original sur-face estate to produce minerals from beneath a part of the original estate now in the hands of another. Hence, the present size and shape of the Smadbeck tract is not necessarily dispositive of the issue of whether Gateway was granted a right to use the surface of the Smadbeck tract to produce minerals from another tract. Nevertheless, without evidence of

the size and shape of the tract conveyed when the right to use the surface was established or evidence of the size or shape of the tract which would

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fn. 9 (continued)

"The bare right to work carries with it the right to use so much of the surface as is reasonably necessary. The mine owner has the right to enter and take and hold possession even as against the owner of the soil * * *. What is necessary and reasonable may be determined by reference
to what is customary, and is a question of fact.

"Most frequently the privileges above described as impliedly incident to the right to mine are expressly granted or reserved in the instrument creating a mineral estate; but their character and extent are not altered by this expression though there may be, of course, express privileges added which would not otherwise be implied. These rights do not create an estate in the surface, but are easements to do certain acts thereon.

"Surface rights and the incidental rights, such as that to use shafts, whether expressed or left to implication, may be used for the purpose only of mining under the particular premises conveyed, and not as a means of removing minerals from other lands. This, of course, may, however, be changed by the terms of the contract."
Id. (emphasis supplied).

be served by the facilities in question, we have no choice other than to assume that the facilities were designed to serve a tract of coal larger than that conveyed when the interests in the land were severed.

The requirement that Gateway must independently satisfy the property rights test is undisputed. Gateway did not have title to both the surface and coal estates on August 3, 1977, and the evidence is not sufficient to support a finding that the conveyance grant expanded the implied right to use the surface to include the right to use the surface for production of minerals in adjacent lands. Nor does the evidence allow us to determine the geographical extent of the surface estate at severance. We must, therefore, examine whether a contractual arrangement existed on August 3, 1977, which formed the basis for the necessary right to use the surface of the Smadbeck tract or to create the surface impacts incident to underground mining within the 100- and 300-foot buffer zones.

The most obvious document giving rise to this property right is the November 15, 1977, lease agreement between Hillman and Gateway. There is no question that this document grants the necessary rights. The problem is that it was executed after August 3, 1977, and, standing alone, cannot be the basis for the necessary property rights.

Gateway urges us to find that the November agreement merely memorializes an earlier binding agreement expressed by the actions and letters between 1975 and early 1977. It contends that these documents are sufficient to be construed as a binding contract between Hillman and Gateway.

After examining the evidence in the record, we find that those documents did not create an enforceable lease in existence on August 3, 1977. Gateway concedes that Pennsylvania law requires a "memorandum containing a description of the property, the consideration and the signature of the party charged" (Gateway SOR at 43, referring to American Leasing v. Morrison Co., supra).

On July 15, 1977, in a letter from the President of Hillman to Johnston, Property Manager for Gateway, confirming a telephone conversation between the two, the President of Hillman stated that "[t]he lease can be for any term required by Gateway for a lease consideration of $1500 payable monthly" (Exh. A-32). The letter ends with the language "[w]e can discuss this proposal at your convenience." Id. The lease executed on November 15, 1977, provided for a monthly rental of $1,250. Comparing the November 1977 lease to the earlier documents we can see no meeting of the minds on the consideration issue prior to August 3, 1977. Without a meeting of the minds regarding consideration, the requirements of American Leasing v. Morrison Co., supra, are not satisfied, and we cannot conclude that a legally enforceable lease similar to the November 1977 lease was entered into before August 3, 1977.

We now look to the possibility of there being some other contractual relationship which bound Hillman to dedicate the land to the mining operation. That relationship could be in the form of a contract designating a mutual area of interest, a joint venture, or a partnership. If such contractual arrangement existed prior to August 3, 1977, and it could be shown

that the terms and conditions of the agreement would bind either or both parties to the dedication of after-acquired property that agreement would be sufficient to establish the basis for a finding that when Hillman acquired the Smadbeck tract it was use of that tract to the Gateway Mine. The only document we know of which might create that contractual relationship is agreement (Gateway Exh. A-19). When Exhibit A-19 was introduced Gateway chose not to introduce the entire document grant provisions and a portion of Schedule A, containing the description of the Thomas Ross tract. We find nothing in the submitted which would allow us to conclude that the 1962 lease created an obligation which would bind Hillman to subse Smadbeck tract. Accordingly, for the reasons set forth above, we affirm the Judge's finding that on August 3, 1977, Gatewa right authorizing it to create the challenged surface impacts within the 100-
and 300-foot buffer zones.

In light of our holdings herein and there being no material fact at issue, appellant's request for a hearing is denie

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 set forth herein, to the extent that Administrative Law Judge Joseph E. McGuire failed to properly employ the "good faith eff test, his decision is in error, and we reverse his decision to the extent

of such failure. In all other respects, his decision is affirmed; NOV No. 82-1-31-9 is affirmed; and the case remanded to O

with this decision.

R. W. Mullen
Administrative Judge

I concur:

James L. Burski
Administrative Judge